

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
1998 Biennial Regulatory Review)
Spectrum Aggregation Limits) WT Docket No. 98-205
for Wireless Telecommunications Carriers)
)

COMMENTS OF OMNIPOINT COMMUNICATIONS, INC.

Introduction

Omnipoint Communications, Inc. ("Omnipoint"), by its attorneys, files these Comments in response to the Notice of Proposed Rulemaking in the above-referenced docket.¹ As discussed below, Omnipoint believes that it would be inappropriate for the Commission to eliminate the CMRS spectrum cap entirely. The spectrum cap can serve a useful safeguard to continuing competition in the CMRS industry. However, based on the current level of competition in the wireless market today, Omnipoint believes that the 45 MHz spectrum cap should be raised to 70 MHz.² Additionally, Omnipoint believes that the increased cap should apply in a uniform manner to all markets, including rural markets.

¹ *In the Matter of 1998 Biennial Regulatory Review – Spectrum Aggregation Limits for Wireless Telecommunications Carriers, Notice of Proposed Rulemaking, WT Dkt. No. 98-205, FCC 98-308 (rel. Dec. 10, 1998) (the "NPRM").*

² As noted in the NPRM (at ¶ 23), Omnipoint Corporation filed a Petition For Reconsideration in WT Docket 96-59 on July 31, 1996, requesting that the Commission reinstate its former rule limiting cellular licensees to 10 MHz of in-region PCS spectrum. That former rule would have expired, on its own terms, by the year 2000. Therefore, Omnipoint believes that

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Significantly, Omnipoint is in large part a product of the Commission's sound policies to enhance competition in the CMRS market, which is the impetus of the CMRS spectrum cap rule under review in this proceeding. Omnipoint is the epitome of a wireless new entrant. Omnipoint is not owned or controlled by any telecommunications giant, cellular duopolist, or national wireless operator. Instead, Omnipoint started as a new entrant in the wireless arena with its acquisition of the license for the New York Major Trading Area, and its subsequent acquisition of additional Personal Communications Services (PCS) licenses through the Commission's Block C auction, as a "small business" and the Commission's Block D, E and F auction, as a "very small business." Omnipoint has built several wireless networks from the ground-up throughout the U.S. and today offers an array of PCS services in such cities as New York, Philadelphia, Boston, Providence, Miami, Detroit and Indianapolis, and their surrounding areas. As a new entrant wireless operator, however, Omnipoint believes that the time is right for the Commission to make moderate modification of its CMRS spectrum cap – by moving the limit from 45 MHz to 70 MHz – in light of the tremendous wireless competition in the marketplace.

(footnote continued from previous page)

the passage of time, and lack of Commission action on the Petition, largely render its reconsideration request moot at this time. Moreover, since the filing of that Petition For Reconsideration, the successful buildout of PCS systems and the advent of competition in the marketplace suggests that re-imposition of the cellular spectrum cap would serve no useful purposes at this time and, in fact, these factors support raising the cap.

Discussion

The CMRS spectrum cap was implemented in 1994 to ensure that multiple service providers could obtain CMRS spectrum to allow for competition in the wireless market.³ At that time, each market was served by two cellular providers and, as duopolists, these providers served with little price competition or innovative service to the public. In broad terms, with the authority to auction commercial wireless spectrum and the mandate to promote a more competitive regulatory environment, the Commission's objective was to disseminate PCS and Specialized Mobile Radio (SMR) spectrum rapidly via the auctions to a wide variety of entrants who would, in turn, inject new competition into the market, and eliminate the incentives for anti-competitive behavior and pricing by the cellular duopolists.

Omnipoint believes that the changes that have occurred in the CMRS marketplace over the last few years make it clear that a spectrum cap set at 45 MHz is no longer necessary to ensure that the CMRS marketplace remains competitive. Since the last review of the spectrum cap rules in 1996,⁴ the CMRS marketplace has changed considerably. The Commission has issued six PCS licenses in each market, as well as digital SMR licenses across the country. In each market, 170 MHz of CMRS spectrum that has been allocated to a variety of CMRS

³ *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act – Regulatory Treatment of Mobile Services, Third Report and Order*, 9 FCC Rcd. 7988, 8108 (1994) (“[t]he purpose of the cap is to prevent licensees from artificially withholding capacity from the market.”)

⁴ *See, In the Matter of Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Report and Order*, 11 FCC Rcd. 7824 (1996).

licensees, including new entrants and Entrepreneurs.⁵ As noted by the Commission in June, 1998, the “signs of competition are clear” in the CMRS industry.⁶ Operators in all CMRS services have engaged in significant build-out and deployment over the past several years to initiate facilities-based competition. As a result, eighty-seven percent of the nation’s POPs have three or more mobile telephone operators providing service.⁷

Omnipoint has endured the agony suffered by every small CMRS provider and believes that the likelihood of major new financing for the remaining small CMRS players is very small. As such, the availability of capital that will be required by many PCS D, E and F Block licensees to build networks for 10 MHz licenses remains in doubt. Therefore, it is apparent that the 45 MHz spectrum cap stands as an obstacle to the efficient utilization of licensed PCS frequencies. Reasonable spectrum consolidation, however, remains a viable alternative to ensure that many licensed frequencies are supported by a physical network infrastructure capable of providing services. Furthermore, third generation wireless technologies, such as high-speed data transmission, can be accommodated only with an aggregation of existing spectrum.

In Omnipoint’s view, the 45 MHz spectrum cap has served its intended purpose of avoiding excessive concentration of licenses during the initial phase of CMRS license allocation

⁵ 47 C.F.R. § 20.16 (spectrum cap includes three CMRS services – cellular, broadband PCS, covered SMR).

⁶ *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 – Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Third Report*, at 2 (rel. June 11, 1998) (“Third Report on CMRS Competition”).

⁷ *Id.* at 18.

and post-auction transfers. The concern of “spectrum hoarding” in the initial license allocation phase of CMRS as a means of incumbents to block out competitor has largely passed. Instead, Omnipoint and other independent CMRS operators have used the auction allocation process to obtain licenses for entry into the wireless market and have made the huge capital investment in wireless networks and facilities designed to compete with wireless incumbents and with other entrants. The fact of this initial competitive entry into the CMRS market is obvious. In major markets today, there is little question that consumers have a variety of facilities-based CMRS operators to choose from, and that competitors have made the necessary capital investment that the Commission concluded would give rise to initial competition in CMRS. In addition, studies have shown that prices for CMRS offerings have dropped between 15 and 34 percent with the introduction of PCS offerings that compete with the incumbent cellular providers.⁸ Omnipoint believes that it is now time to revisit the need for the 45 MHz limitation since the Commission has allocated the bulk of CMRS spectrum, and facilities-based competition is well underway.

The Commission should modify the spectrum cap to allow carriers to hold up to 70 MHz of CMRS spectrum in a given market. While the total elimination of the cap could lead to an anticompetitive result – one or two CMRS providers in a given market, the imposition of a 70 MHz spectrum cap would ensure that each market will have *at least* three competitive CMRS providers, in most cases with the addition of existing SMR carriers.⁹ It is appropriate at this time to raise the spectrum cap so that the industry can, once again, further refine the competitive

⁸ Id. at 19.

⁹ As outlined in the Third Report on CMRS Competition (at 18), 87 percent of the nation’s POPs are covered by three or more CMRS providers.

landscape.¹⁰ Given the high costs of network building and deployment, economies of scale are essential for wireless providers looking to partner in various markets. In particular, the industry needs to capture efficiency gains through nationwide and regional management of systems. Capturing these efficiencies means that disparate CMRS licensees will have to engage in significant consolidation and merger. CMRS carriers need the increased regulatory flexibility to partner and expand offerings to better respond to market needs and demands. The 45 MHz CMRS spectrum cap can, however, stand in the way of such partnering. As the Commission has noted before, increased regulatory flexibility allows competition to flourish.¹¹ By raising the spectrum cap to 70 MHz, the Commission will ensure that the CMRS market is not restricted by outmoded regulatory requirements.

Furthermore, the 70 MHz spectrum cap should apply across all markets, including rural markets. A cap that relies on case-by-case adjudication will have the effect of dampening otherwise efficient industry partnering due to the uncertainties of the regulatory approval process.¹² Additionally, cordoning off rural markets, or any other segment of the market, will cause competitive partnering and offerings to be re-worked and re-configured, only to meet the demands of the FCC spectrum cap limits. Such regulatory strictures are likely to have the

¹⁰ See, G. Rosston & J. Steinberg, "Using Market-Based Spectrum Policy to Promote The Public Interest," at 6 (1997) ("Rosston Paper") (advocating that the Commission should ensure that its allocations that are intended to further competition do inadvertently restrict competition in the future).

¹¹ Third Report on CMRS Competition, at 63.

¹² Rosston Paper, at 14 ("[i]f spectrum users and their financial supporters are not reasonably certain of the rules that will govern spectrum use, they will be less willing to invest in obtaining and developing the spectrum.").

unintended result of slowing down innovative mergers, consolidations, and partnering only to those areas where such market transactions can occur, and leaving behind rural areas. By contrast, a uniform and uncomplicated 70 MHz spectrum cap limit across all markets would hold to the premise of competitive CMRS and allow necessary growing and maturing in the CMRS industry.


Conclusion

Based on the forgoing, Omnipoint respectfully requests that the Commission raise the current CMRS spectrum cap to 70 MHz.

Respectfully submitted,

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